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EU Employment Law Report

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Case law

Posting of workers

ECJ 3 June 2021, Team Power Europe v Direktor na Teritorialna (C 784/19)

Abstract

In this landmark ruling, the ECJ condemns the drop in social protection caused by temporary work agencies and their practice of placing workers abroad while maintaining the reduced social protection of the employing Member State, whereas the law governing this contract must be that where "substantial activities" are carried out. The decision is available here.

Facts

A labour leasing agency established in Bulgaria primarily assigns its temporary workers subject to the Bulgarian social security scheme to user undertakings located abroad.

After the Bulgarian authorities refused to issue a "A1" certificate certifying that the Bulgarian social security legislation was applicable to an employee hired in Bulgaria and leased to a user undertaking established in Germany from October to December 2018 because (i) he had not been maintained and, (ii) that user undertaking did not carry out substantial activity in Bulgaria, the labour leasing agency filed proceedings before the Administrative Court of Varna in Bulgaria. The Bulgarian Court referred to the ECJ as to the criteria to be taken into account in order to assess whether a temporary work agency ordinarily performs 'substantial activities other than purely internal managerial activities' in the Member State in which it is established within the meaning of EU law.

Legal context

Pursuant to Article 12(1) of the Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, "*a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person*".

Article 14(2) of the implementing Regulation No 987/2009 of the European Parliament and of the Council of 16 September 2009 adds that "*For the purposes of the application of Article 12(1) of the basic Regulation, the words 'which normally carries out its activities there' shall refer to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out.*"

Decision

The ECJ clarifies the meaning of the concept of an employer that "normally carries out its activities" in the Member State in the context of temporary work agencies. The Grand Chamber of the Court ruled that such a temporary work agency established in a Member State must, to be considered that it 'normally carries out its activities' in that Member State, carry out a significant part of its activities of assigning temporary agency

workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State.

Applicable social security legislation

ECJ 20 May 2021, FORMAT Urzadzenia v. Zaklad Ubezpieczen (C-879/19)

Abstract

A person who performs, during successive periods of work, paid employment activity in different Member States must be regarded as being normally employed in the territory of two or more Member States for the purposes of Article 14(2) of Regulation No 1408/71, so long as the duration of the uninterrupted periods of work completed in each of those Member States does not exceed 12 months.

The decision is available here.

Facts

A Polish national residing in Poland, worked for a company with its registered office in Poland, under a fixed-term employment contract for the period from 20 October 2006 to 31 December 2009. During that period, he worked in France from 23 October 2006, in the United Kingdom from 5 November 2007 to 6 January 2008, then again in France from 7 January 2008.

The Polish Insurance Institution refused to issue the person concerned with an E 101 certificate stating that, from 23 December 2007 to 31 December 2009, the individual was covered by the Polish social security scheme in respect of the work which he had performed on behalf of Format.

An action brought before the Warsaw Regional Court against that decision by both employer and employee was dismissed. The Court held that, in so far as the person concerned had worked on behalf of the employer for several months in the territory of two successive Member States, he did not fall within the scope of Article 14(2)(b) of Regulation No 1408/7, but within that of Article 13(2)(a) of that regulation.

Legal context

Article 13 2 (a) of (the old) Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes ('Regulation No 1408/71'): "*a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State*"

Article 14(2)(b) of Regulation No 1408/71: "*a worker who, while not being habitually employed at sea, is employed in the territorial waters or in a port of a Member State on a vessel flying the flag of another Member State, but is not a member of the crew, shall be subject to the legislation of the first State*"

Decision

Regulation no. 1408/71 determines the applicable social security law of EU workers. It seeks to ensure that the persons concerned are, in principle, subject to the social security scheme of only one single Member State in order to avoid overlapping of legislations applicable and the complications which could result therefrom. As a general rule, a person employed in the territory of one Member State shall be subject to the legislation of that State, even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State (article 13 (2) a). Specific rules apply where a person is normally employed in several Member States, in

which case this person is subject (i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States (ii) to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any of the Member States where he is pursuing his activity (art 14 (2) b).

The ECJ was asked if this specific rule also applies when a person remains under a single employment contract with a single employer while working solely in several other Member States for several successive months. The question was whether such a person can be considered to be "normally employed" in the territory of two or more Member States in the sense of article 14 (2).

The Court ruled that was not the case. On the basis of the documents brought before the Court (to be verified by the referring Court) it appeared that the worker's employment ran for over 13 months in one Member State (France), and was consequently interrupted for a 2 month occupation in another Member State (United Kingdom) and ultimately continued for another 2 years in the first Member State (France). The person concerned therefore performed nearly all of his paid employment activity in the territory of a single Member State (France). If the employment in the territory of a single Member State constitutes, in fact, the normal arrangement for the person concerned, such employment cannot fall within the scope of the specific rule of article 14 (2).

As a derogation to the general rule of article 13 (one applicable system, i.e. the territory of employment), the specific rule of article 14 must be interpreted strictly. Although this provision does not set any temporal limits regarding the possible successive periods of work completed in the territory of more than one Member State, the Court considered that a person would fall under the scope of Article 14 (2) so long as the duration of the uninterrupted periods of work completed in each of the Member States does not exceed 12 months. The Court thus sought to ensure a consistent interpretation of Regulation 1408/71 with EU legislation on the temporary and short-term posting of workers that limits the duration to a maximum period of 12 months. By setting a clear temporary limit at maximum 12 months for there to be successive employment in different Member States in the sense of Article 14 (2), the Court also sought to prevent the circumvention of the general rule of 13 (a) (social security law of territory of employment).

Non-discrimination

ECJ 15 April 2021, AB v Olympiako Athlitiko Kentro Athinon – Spyros Louis (C-511/19)

Abstract

The ECJ examined the labour reserve system for employees close to a full old age pension and ruled that the difference in treatment on grounds of age established by that system pursues a legitimate labour policy objective and that the means of achieving this are appropriate and necessary.

The decision is available here.

Facts

In 1982, an employee was recruited by the Athens Olympic Athletic Centre ('OAKA'), a legal person governed by private law within the Greek public sector, under an indefinite duration contract.

On 1 January 2012, the employee was placed under the *labour reserve system* prior to his retirement, which resulted in his pay being reduced to 60% of his basic salary. On 30 April 2013, OAKA terminated the employee's contract without giving him the severance pay provided for in the event of termination as a result of the labour reserve system.

The employee challenged the validity of his placement under the labour reserve system before the Greek courts. He claimed that Greek law established a difference in treatment on grounds of age that is contrary to the directive on equal treatment in employment and occupation. The Greek Court referred to the ECJ as to whether the labour reserve system involves indirect discrimination on the grounds of age, in that it is reserved for employees who are close to full retirement, and, if so, whether such unequal treatment can be justified.

Legal context

Pursuant to article 2(1) and (2) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation: "*1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 (…)*".

Pursuant to article 6(1) of Directive 2000/78: "'*Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.*

Such differences of treatment may include, among others: (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection (…) "

Decision

The ECJ holds that the Greek labour reserve system contains a difference in treatment that is directly based on age but does not constitute discrimination based on age. The legislation does not unreasonably prejudice the interests of the employees placed under that system because they, among others, enjoy protection via these measures. The Greek labour reserve system, therefore, does not go beyond what is necessary to achieve the legitimate employment policy objectives.

ECJ 3 June 2021, Ministero della Giustizia v. GN (C-914/19)

Abstract

An age limit of 50 years for accessing the profession of notary is contrary to the EU principle of non-discrimination.

The decision is available here.

Facts

An Italian candidate for the profession of notary challenged the compatibility of an Italian decree with EU law in that it denied her access to the profession on account of her having passed the statutory age limit of 50 years. Pending her appeal before the national Courts, she had by virtue of a local Court order been allowed to pass the written exams and had successfully done so.

Legal context

- Article 21 of the Charter of Fundamental Rights of the European Union;
- Article 10 of the Treaty on the Functioning of the European Union;
- Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment

Decision

First and foremost, the ECJ established that the age limit of 50 years indeed fell within the scope of Directive 2000/78, as it covers the conditions for access to employment, self-employment or occupation, including selection criteria and recruitment conditions (art 3.1) and the age of the candidate constituted a criterium for access to a profession. As candidates are treated differently according to their age to gain access to the profession of notary under the Italian Decree, the question was whether or not the objective for this difference in treatment was legitimate and the requirement was proportionate (art 6.1).

While the Decree itself did not state the objective of the age limit, this does not preclude the Italian government from explaining the objective to be examined by the Court. The age limit was said to serve three objectives: 1) to ensure the stable performance of the profession of notary for a considerable period of time prior to the age of retirement in order to ensure the viability of the social-security scheme as set up by the professional organisation of notaries, 2) to protect the proper execution of prerogatives linked to the profession and its high standards and 3) to facilitate access to the profession for younger generations and to rejuvenate the professional corps.

After careful examination of each of these objectives, the Court set out the reasons why it considered that none of these seemed to hold up, while leaving it ultimately up to the national courts to verify these factual aspects. Regarding the first reason, the Court observed that the age limit did not seem justified in that the specific social security scheme was conditional, not upon any age limit, but on having worked as a notary for at least 20 years. As for reason number two, the Court considered that setting a maximum age for recruitment based on the training requirements of the post is indeed considered legitimate under article 6.1.(C) of the Directive. However, since the Decree outlined a series of specific professional training requirements (such as a law degree and passing an exam), the age limit in itself could not be perceived as a training requirement. Reason number three was equally rejected in that – although a legitimate objective in itself – the age limit did not seem to serve the purpose of rejuvenating the profession, since more positions were available than the number of candidates who had successfully passed the exams.

Even if the national courts were to consider the objectives as legitimate, it remained to be seen if the age limit as a means to promote the access of young people to the profession was proportionate, also taking into account the right of older employees to continue to remain active in a professional environment. There is a balance between two conflicting interests that Member State authorities are required to find. On the matter of proportionality, the Court also ruled against the reasons brought forward by the Italian government. It

concluded that the age limit for participation in the competition for access to the profession of notary is contrary to article 21 of the Charter of Fundamental Rights of the European Union and Article 6(1) of Council Directive 2000/78/EC in so far as the Italian Decree did not appear to pursue the aims of ensuring that the profession is practised in a stable manner for a significant period before retirement, of safeguarding the proper functioning of notarial privileges and of facilitating the natural turnover and rejuvenation of that profession and, in any event, goes beyond what is necessary to achieve those aims, while considering this as a matter for the referring court to determine.

Freedom of association

ECtHR 10 June 2021, LO and NTF v. Norway (Application no. 45487/17)

Abstract

In this case, the ECtHR ruled that a boycott organised by the trade union may be protected by Article 11 of the ECHR (freedom of assembly and association). The ECtHR ruled, however, that the right to boycott is not unconditional and that Member States have a wide margin of discretion as to what restrictions can be placed on this right. This is because balancing the interests of employers and employees is difficult and because there are differences between Members States when it comes to the rules for labour conflicts.

The ruling is available here.

Facts

In the 1970s, the applicant trade unions (i.e. LO and NTF) entered into a collective framework agreement ('CFA') with the Confederation of Norwegian Enterprise (NHO) and the Norwegian Logistics and Freight Association, in respect of a fixed pay for dockworkers at many of the major ports in Norway. In 2013 Holship Norge AS, which was not a party to the CFA, decided to employ four workers at the port of Drammen, rather than the qualified dockworkers under the CFA.

As a consequence, the NTF organised a boycott of all shipping in Drammen involving Holship. It obtained permission from the local court in Drammen. Holship appealed this and the Supreme Court concluded that priority of engagement as demanded by the NTF was not sufficiently justified and did not satisfy the requirement to strike a fair balance between freedom of establishment and the possible fundamental right to boycott. It thus found the boycott unlawful. The trade unions argued that this violated their right to freedom of assembly and association and went to the ECtHR.

Legal context

Pursuant to Article 11 of the European Convention of Human Rights: "*1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Decision

The ECtHR ruled that the right to boycott is not unconditional and grants national courts a wide margin of discretion as to what restrictions can be placed on the right to collective action. The decision to consider the boycott unlawful falls within this wide margin of appreciation of the Supreme Court, so that there is no violation of the ECHR.

In its judgment, the ECtHR accepted that rights that follow from EEA law, including the freedom of establishment, may justify interference with the freedom of association. At the same time, the ECtHR indicated that freedom of establishment is not an equal right, but rather a factor in assessing whether interference with the freedom of association is proportionate.

The ECtHR also emphasised that financial interests cannot in themselves be decisive in the assessment of proportionality, and that the assessment must be made in a way that ensures that freedom of association does not become devoid of substance.

Freedom of expression

ECtHR 15 June 2021, Melike v. Turkey (Application no. 35786/19)

Abstract

In this judgment, the Court ruled that the dismissal of an employee was not sufficiently justified and constituted a violation of Article 10 ECHR (freedom of expression). The immediate dismissal without any right to compensation is disproportionate in view of her activities, length of service and age.

The ruling is available here.

Facts

A contractual cleaner employed by the Turkish Ministry of National Education was dismissed without entitlement to compensation for having clicked on the "Like" button under various Facebook articles posted by third parties. The dismissal was confirmed by a disciplinary commission in accordance with an applicable collective bargaining agreement. Neither the labour court, nor the Turkish Constitutional Court considered that the dismissal constituted a violation of the fundamental right of freedom of expression.

Legal context

Article 10 of the European Convention on Human rights on freedom of expression

"1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*"

Decision

The ECtHR considered that the domestic courts had failed to carry out a sufficiently thorough examination of the content of the contested publications or the context in which they had been posted. While the content of the post was outspokenly critical of the authorities, the applicant was, as an employee in a private-law employment relationship, not bound by the same duty of loyalty and reserve as required by civil servants.

Moreover, the national courts had completely failed to examine the potential impact of the conduct held against the applicant, although it was essential in assessing the potential influence of an online publication to determine its scope and public reach. On that score, the Court observed that the applicant was not the individual who had created and published the content on Facebook, but had only clicked the "like" button below the content. This could not be considered as carrying the same weight as actually posting content on social networks, which implies an active desire to disseminate it. The Court also pointed out that the applicant, as a contractual employee, could not have had the significant impact she was said to have had on pupils, parents, teachers and other employees. Whether or not these people actually had had access to the applicant's Facebook account was another issue the national authorities had failed to establish in their decisions. Additionally, they had not established whether or not these likes had actually been noticed by this audience and given rise to complaints and incidents that might jeopardise order and peace in the workplace.

The reasons given to justify the applicant's dismissal were therefore not regarded as relevant and sufficient. According to the ECtHR, both the disciplinary committee and national courts failed to take all relevant facts and circumstances of the case into account as to whether or not her action had, in fact, disturbed the peace and tranquillity in the workplace. Furthermore, by applying the maximum penalty (immediate termination without compensation) the disciplinary committee had also taken a disproportionate sanction, particularly considering the applicant's seniority and age.

Equal pay for male and female workers

ECJ 3 June 2021, K and Others v. Tesco Stores Ltd (C-624/19)

Abstract

Our Brussels employment team already discussed this ECJ case in an article published on 7 June 2021. The article entitled “Equal pay rule can be invoked in court between individuals or private entities for alleged gender pay differences in ‘work of equal value” is available here.

The ruling is available here.

Public policy

There were no significant public policy developments during the second quarter of 2021.

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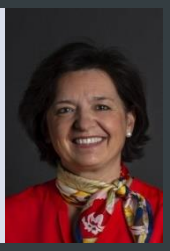

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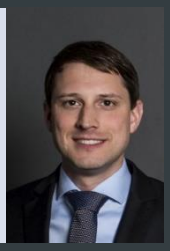

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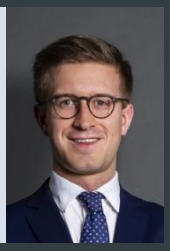

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